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No. 08-495

IN THE
Supreme Court of the United States

MANOJ NIJHAWAN,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

On Writ Of Certiori To The
United States Court Of Appeals
For The Third Circuit

BRIEF FOR AMICI CURIAE AKIO KAWASHIMA AND FUSAKO KAWASHIMA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether petitioner's conviction for conspiracy to commit bank fraud, mail fraud, and wire fraud qualifies as a conviction for conspiracy to commit an "offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000," 8 U.S.C. § 1101(a)(43)(M)(i) and (U), where petitioner stipulated for sentencing purposes that the victim loss associated with his fraud offense exceeded $100 million, and the judgment of conviction and restitution order calculated total victim loss as more than $680 million.

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INTEREST OF AMICUS CURIAE

Akio Kawashima and Fusako Kawasima (the "Kawashimas"), as *amici curiae*,[1] submit this brief on the grounds that the decision in the present case may impact the outcome in the matter of *Kawashima v. Mukasey*, Case Nos. 04-743 and 05-74408, currently pending in the U.S. Court of Appeals for the Ninth Circuit.

The Kawashimas are natives and citizens of Japan.[2] The Kawashimas were admitted to the United States as lawful permanent residents on June 21, 1984. In 1997, Mr. Kawashima was charged with subscribing to a false statement on a corporate tax return, in violation of 26 U.S.C. § 7206(1). Mrs. Kawashima was charged with aiding and assisting in the preparation of a false statement on a tax return, in violation of 26 U.S.C. § 7206(2). Mr. Kawashima pled guilty to the charge, and like petitioner Nijhawan, entered a plea agreement wherein he stipulated that the "total actual tax loss" was $245,126. The stipulation was solely for the purpose of determining his offense level under the Sentencing Guidelines and included amounts for other years and another entity for which he did not

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[1] Pursuant to Rule 37.3(a), the parties have consented to the filing of this brief. Letters of consent are being filed with the Clerk. No party or counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel has made a monetary contribution to the preparation or filing of this brief.

[2] Aiko Kawashima is referred to as Mr. Kawashima and Fusako Kawashima is referred to as Mrs. Kawashima herein.

plead guilty. The plea agreement for sentencing further stipulated that Mr. Kawashima could be ordered to pay the same amount in restitution. Mrs. Kawashima pled guilty to aiding and assisting in the preparation of a false tax return but no amount of loss was stipulated in the plea agreement for sentencing or other purposes.

On August 3, 2000, the Immigration and Naturalization Service initiated removal proceedings against the Kawashimas alleging removability under 8 U.S.C. § 1101(a)(43)(M)(i). After holding a removal hearing, the Immigration Judge ("IJ") concluded the Kawashimas were removable on the grounds that their guilty pleas "constituted aggravated felonies under the removal statute."

Section 7206 makes it a crime to file a false and untrue statement on a federal tax return whether or not the Government suffers a revenue loss.

The Board of Immigration Appeals ("BIA") later affirmed the decision of the IJ. The Kawashimas then separately filed timely petitions for review of the BIA's decision with the U.S. Court of Appeals for the Ninth Circuit, which were consolidated.

Initially, the petition for review was denied with regard to Mr. Kawashima, but was granted with regard to Mrs. Kawashima and her order of removal was vacated. *See Kawashima v. Gonzales*, 503 F.3d 997 (9th Cir. 2007). Upon Mr. Kawashima's request for rehearing, the Ninth

Circuit reversed its prior ruling and found that monetary loss was not an element of the Kawashimas' crimes of conviction.[3] The Ninth Circuit found that the Government failed to show that Kawashimas' convictions were aggravated felonies under the categorical approach or the modified categorical approach set forth in *Taylor v. United States*, 495 U.S. 575 (1990) and *Shepard v. United States*, 544 U.S. 13 (2005). The court further held that under the categorical approach, the record of the Kawashimas' convictions and sentencing stipulations could not be reviewed to determine whether they were found guilty to causing a loss in excess of $10,000. *See Kawashima v. Mukasey*, 530 F.3d 1111, 1117 (9th Cir. 2008).

On September 15, 2008, the Government filed a Petition for Rehearing *En Banc*, which the Kawashimas opposed. On January 23, 2009, the Government requested that the Ninth Circuit consider holding the proceedings in *Kawashima* pending disposition by this Court of the present matter. On February 2, 2009, the Kawashimas opposed the Government's request urging that the decision be finalized as correct. To date, the Ninth Circuit has taken no further action.

The issue before the Court in the present case is one of the issues before the Ninth Circuit in *Kawashima*. Because the decision of the Court in

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[3] The Ninth Circuit granted rehearing as to both the Kawashimas even though the petition for rehearing was filed only on behalf of Mr. Kawashima and discussed issues only as to Mr. Kawashima's crime of conviction.

this case may affect the rights of the Kawashimas, *amici* qualify as interested parties pursuant to Rule 37 of the Supreme Court Rules and respectfully submit this brief in support of the petitioner.

SUMMARY OF ARGUMENT

The removal (deportation) statute, 8 U.S.C. § 1227(a)(2)(A)(iii), requires, in express terms, that an alien is removable if *convicted* of an *aggravated felony* as defined. The aggravated felony, required in the petitioner's case, is a conviction of a crime of "fraud and deceit in which the loss to the victim or victims exceed $10,000." Neither petitioner Nijhawan nor Amici Akio Kawashima and Fusako Kawasima were convicted of such an aggravated felony and any order of removal in their cases plainly violated the statute.

The Third Circuit ignored the plain language of Congress and attempted to sidestep the constitutional principle that the alien must be convicted of an aggravated felony beyond a reasonable doubt. Because the crime of conviction did not satisfy the aggravated felony as defined, the Third Circuit erroneously filled in the gaps with less than proof beyond a reasonable doubt.

The Court below failed to follow the categorical or modified categorical approach set forth by the Court in *Taylor v. United States*, 495 U.S. 575 and *Shepard v. United States*, 544 U.S. 13 (2005), which was recently reaffirmed by the Court in *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183 (2007).

The core principles of *Duenas-Alvarez* govern the case at bar. The crime of conviction must fall with the "listed" offense (aggravated felony) and that determination is a question of law, using the categorical approach of *Taylor* and ensuring that all the elements of the aggravated felony were established beyond a reasonable doubt.

Amici contend that the governing statute is absolutely clear and that the order of removal of Nijhawan as decided by the Court below was erroneous. Should the Court find ambiguity in the statute, however, the Court should apply the rule of lenity because of the catastrophic consequences of removal, both for Nijhawan and the *Amici,* and because of the inevitable uncertainty that will ensue if any "tethering" or fact-finding process espoused by the Third Circuit is allowed.

The Third Circuit's "tethering" approach is contrary to the plain language of the statute, as well as the decisions of the Court in *Taylor*, *Shepard* and *Duenas-Alvarez*. In addition, it is constitutionally impermissible for a Court to fill in blanks of a crime of conviction by proof less than proof beyond a reasonable doubt in order to squeeze the crime of conviction into the term aggravated felony.

The decision of the Third Circuit is erroneous and should be reversed.

ARGUMENT

I. The Plain Language of 8 U.S.C. § 1101(a)(43)(M)(i) Requires that the Loss Requirement be Established in the Crime of Conviction.

Pursuant to 8 U.S.C. §1227(a)(2)(A)(iii), an "…an alien who is *convicted* of an aggravated felony at any time after admission is deportable." (emphasis added). The statute lists over 15 crimes constituting an aggravated felony under 8 U.S.C. § 1101(a)(43). An "aggravated felony" under 8 U.S.C. § 1101(a)(43)(M)(i) is a crime that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." Subsection (M)(i) cannot be interpreted so that part of the definition, "fraud or deceit," defines the crime of conviction and the rest is severed and irrelevant to the definition that Congress enacted. "A statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on the context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Since subsection (M)(i) defines one of the aggravated felonies for which an alien defendant is removable, an alien defendant can be removed pursuant to that subsection only when a conviction satisfies the entire definition of subsection (M)(i), namely that the alien is *convicted* of an *aggravated felony*.

The use of the words "in which" mandates that the loss requirement be a part of the crime of conviction. The Ninth Circuit has held that the phrase "in which" is not merely a qualifying term, but rather makes clear that the loss requirement is

an element of the generic crime of "fraud and deceit." *See e.g.*, *Kawashima*, 530 F.3d at 1117 ("We have consistently interpreted Subsection M(i)'s monetary loss requirement as an 'element' of the generic offense, which the record of petitioner's conviction must demonstrate that the jury actually found or the petitioner (as defendant) necessarily admitted.") (citations omitted).

In contrast, Congress defined an aggravated felony in 8 U.S.C. §1101(a)(43)(G) to include a theft "*for which* the term of imprisonment [is] at least one year." (emphasis added). In this example, it is clear that the phrase "for which" was intended to signify a qualifier because a term of sentence clearly can never be an element of the prior offense. The use of the different phrase "in which" in subsection (M)(i) evidences the fact that "Congress act[ed] intentionally and purposefully." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987). The phrase "in which" cannot be interpreted to have the same purpose as the phrase "for which," as the Third Circuit held in *Nijhawan v. AG of the United States*, 523 F. 2d 387 (3d Cir. 2008).

A plain reading of the text of 8 U.S.C. § 1101(a)(43)(M)(i) requires that the loss requirement be an element of the aggravated felony and be established in the crime of conviction.

II. Subsection (M)(i) Requires Application of the Categorical Approach Set Forth in *Taylor* and *Shepard*.

Section 1101(a)(43) defines the term aggravated felony, a concept that implicates both civil immigration and criminal consequences of a prior conviction. An alien convicted of an aggravated felony after admission is deportable. *See* 8 U.S.C. § 1227(a)(2)(A)(iii). Similarly, an alien who returns to the United States after removal for an aggravated felony is subject to an enhanced statutory maximum sentence of twenty years in prison. *See* 8 U.S.C. § 1326(b)(2). Since both sections 1227(a)(2)(A)(iii) and 1326(b)(2) predicate the catastrophic consequences to an alien upon a conviction suffered, the plain language of both statutes requires application of *Taylor v. United States*, 495 U.S. 575 (1990).

In *Taylor*, this Court instructed that "the trial court [may] look only to the fact of the conviction . . ." *Id.* at 602. Where the jury was "actually required [ ] to find all the elements of [the] generic [offense] in order to convict the defendant," the sentencing court may consider the charging paper and jury instructions as well. *Id.* *Taylor* permits the consideration of limited documents of undisputed import in addition to the fact of conviction only when an element in the statutory definition of the prior offense (the crime of conviction) includes conduct that constitute both a removable offense and not a removable offense. The Court did not permit an inquiry into the underlying facts of the conviction that a jury was not required to find. *See also Shepard v. United States*, 544 U.S. 13 (2005).

Section 1101(a)(43)(M)(i) was first added in 1994, *see* P.L. 103-416 § 222, 108 Stat. 4321-22, four years after the *Taylor* decision established that the categorical analysis applies to criminal enhancement statutes. By that time, the most severe penalties under 8 U.S.C. § 1326(b)(2) were available only as to aggravated felons. Subsection (M)(i) was adopted several years after *Taylor*, yet no language of the statute or legislative history disavows application of the *Taylor* paradigm, of which Congress was presumably aware. *See Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979). Equally important, the Court has upheld the *Taylor* paradigm on removal matters. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007).

Amici urges the Court to follow its recent decision in *Duenas-Alvarez*, as petitioner has also urged. *Duenas-Alvarez* controls the determination of the issue presented by petitioner, as well as one of the issues in Kawashimas' case.

The Court in *Duenas-Alvarez* made several controlling points:

(1) The crime of conviction must "fall[] within the scope of the listed offense . . ." (8 U.S.C. § 1101(a)(43)). 549 U.S. at 185-186 (citing *Taylor*) (additional citations omitted);

(2) Whether the crime of conviction is within the listed offense is a question of law; that is, fact finding is not permitted;

(3) To make the determination that the crime of conviction did fall within the listed offense (sometimes called the "generic" felony), the Court approved, in removal cases, the "categorical" and "modified categorical" approach set forth in *Taylor* and *Shepard*; and

(4) To determine whether the crime of conviction is one of the listed offenses, courts may consider only those records of conviction that establish, as a matter of law, that the elements of the listed generic crime, and each of them, were established beyond a reasonable doubt in the record of the crime of conviction.[4]

The Third Circuit in *Nijhawan* did not address or mention *Duenas-Alvarez* or its core principles. Under *Duenas-Alvarez*, *Taylor* and *Shepard*, "tethering" or fact finding by a court is not allowed for obvious constitutional reasons. *See also*, *United States v. Hayes*, 555 U.S. __ (February 24, 2009).

[4] In the recent decision of the Court, *United States v. Hayes*, 555 U.S. __ (February 24, 2009), the Court made the point that the "domestic relationship" must be established beyond a reasonable doubt, to qualify as "as misdemeanor crime of domestic violence" under the Federal Gun Control Act of 1968, as amended, 18 U.S.C. § 921.

III. If Subsection (M)(i) is Ambiguous, the Rule of Lenity Must Apply.

As petitioner has argued, the rule of lenity should be applied to the *Nijhawan* case, as well as to all other like cases, if the Court finds the statute ambiguous, which *amici* argue in Part I is not ambiguous. This longstanding principle directs that "[t]he rule of lenity is that criminal statutes, including sentencing provisions, are to be construed in favor of the accused." *Taylor v. United States*, 495 U.S. 575, 596 (1990). The Court, in *Fong Haw Tan v. Phelan*, explained that "[w]e resolve doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile. . . . [S]ince the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used." 333 U.S. 6, 10 (1948).

Should the Court not apply the rule of lenity, the penalties could be severe and irreversible for the Kawashimas in light of the fact that under the categorical approach set forth in *Taylor*, the statutes under which the Kawashima's were convicted did not require the government to prove the amount of revenue loss. To the extent this Court does not find that the categorical approach or the modified categorical approach applies to subsection (M)(i), or that the statute is ambiguous, the rule of lenity should be followed because individuals who accepted plea agreements as to conviction, but did not agree to a loss amount, such as the Kawashimas, face the

serious penalty of deportation as a result of the vagueness in the statute. Accordingly, the longstanding rule of lenity should apply in the instant case, as well as to all other cases which occurred prior to the Court's decision in this matter.

IV. The Third Circuit's Interpretation of Subsection (M)(i) in *Nijhawan* is Constitutionally Doubtful.

Assuming, *arguendo*, any ambiguity in the statutory scheme, the interpretation of subsection (M)(i) in *Nijhawan* must also be rejected as constitutionally impermissible. The Court has long adhered to the principle that "'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'" *Jones v. United States*, 526 U.S. 227, 239 (1999) (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)). The Court has explained that, "[i]t is out of respect for Congress, which we assume legislates in the light of constitutional limitations, *Rust v. Sullivan*, 500 U.S. 173, 191 (1991), that we adhere to this principle, which 'has for so long been applied by this Court that it is beyond debate.'" *Jones*, 526 U.S. at 240 (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

Shepard held that the constitutional doubt canon supported a narrow construction of the *Taylor* categorical approach. *See* 544 U.S. at 24-26.

Shepard observed that where all the requisite elements are present in the record of the prior conviction used to enhance a sentence, *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), any constitutional concerns under *Apprendi* is avoided. *See Shepard*, 544 U.S. at 25 (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000)). But when facts beyond the elements are at issue, disputes on those facts "raise[] the concern underlying *Jones* and *Apprendi*: the Sixth and Fourteenth Amendments guarantee a jury standing between a defendant and the power of the State, and they guarantee a jury's finding of any disputed fact essential to increase the ceiling of the potential sentence." *See Id.* Thus, the Ninth Circuit correctly recognized that: "Sixth Amendment concerns *are* implicated when courts stray from the *Taylor* approach and make findings *about* the prior conviction by referring to sources outside the formal record of conviction." *United States v. Brown*, 417 F.3d 1077, 1080 n.4 (9th Cir. 2005) (emphases in original).

The Third Circuit's construction of subsection (M)(i) is constitutionally flawed because it obliges courts to "stray." The Third Circuit's interpretation of subsection (M)(i) and its notion of "tethering" impermissibly allows courts to make findings of fact as to prior convictions that determine the statutory maximum under certain offenses under 8 U.S.C. § 1326(b)(2) and which are not limited solely to the fact of conviction. The Third Circuit in *Nijhawan* endorsed reliance on "a restitution order, which by its nature is neither found by a jury nor specifically pled to by a defendant," 523 F.3d at 394, holding that "the loss requirement invites further inquiry

into the facts underlying the conviction, and that inquiry is satisfied if the amount of loss is sufficiently tethered to the fraud conviction." *Id.* at 397. This construction is constitutionally impermissible because it would allow sentencing courts, not juries, to make factual findings regarding facts underlying prior offenses used to authorize increased penalties under 8 U.S.C. § 1326(b)(2). *Apprendi*, 530 U.S. at 490.

V. Any Approach which Permits Independent Fact Finding or "Tethering" is Constitutionally Impermissible.

The categorical approach must be employed as opposed to any approach which permits independent fact finding or "tethering." If the categorical approach is not employed, "it will often be necessary to go beyond the fact of conviction and engage in an elaborate fact-finding process regarding the defendant's prior offens[e]." *Hayes*, 555 U.S. at 7 (Roberts, C. J., dissenting) (citing *Taylor,* 495 U.S. at 601 (1990)). Chief Justice Roberts' recent dissent in *Hayes* recognized that that, "the practical difficulties and potential unfairness of a factual approach are daunting." *Id.* The Ninth Circuit has rejected a fact finding approach where the crime of conviction is missing an element of the generic crime because it is impossible to find that "a jury was actually required to find all the elements of" the generic crime. *See Li v. Ashcroft,* 389 F. 3d 892, 899-901 (9th Cir. 2004) (Kozinski, J., concurring). In such cases, "[t]he crime of conviction can never be narrowed to conform to the generic crime because the jury is not required—

as *Taylor* mandates—to find all the elements of the generic crime." *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1073 (9th Cir. 2007).

In *Li v. Ashcroft,* 389 F. 3d 892, 900 (9th Cir. 2004), the Ninth Circuit was "especially reluctant to rely solely on the charging document and the judgment to establish a fact that the government was not required to prove, and the jury was not required to find, to convict [Li]." The fact that:

> [the] sentencing judge did find by a preponderance of the evidence that [Li] and his associates were responsible for losses amounting to much more than $10,000…does not satisfy the requirement that the defendant ha[s] been convicted of each element of the generic crime.

Id. at 898. In his concurring opinion, Chief Judge Kozinski stated that an approach which permitted a fact finding related to the underlying offense was "unfair to defendants because it denies them notice and a reasonable opportunity to rebut the charges against them." *Id.* at 900. A defendant does not have reason to challenge the government's proposed amount of loss if it is not an element of the crime. *Id.* ("Since the amount of loss wasn't an element of the charges against Li, he had no reason to believe it would be relevant to his conviction, and thus no reason to cast doubt on the government's evidence as to the amount of loss."). The same is true with respect to plea agreements which include an amount of loss for sentencing purposes only. *See e.g.*,

Navarro-Lopez, 503 F.3d at 1073 n. 10 ("The same analysis applies in cases . . . where courts review plea agreements instead of jury verdicts.").

Any approach which permits an inquiry into the facts beyond the elements necessary for conviction would result in an erroneous application of subsection (M)(i). For example, in *Kawashima*, the respective statutes of convictions clearly did not require the government to prove the amount of loss that the Kawashimas' actions caused. Mr. Kawashima pled guilty to subscribing to a false statement on a tax return. Mrs. Kawashima pled guilty to aiding and assisting in the preparation of a false tax return. The Kawashimas could be convicted of violating §§ 7206(1) and 7206(2) without there being a revenue loss to the Government, unlike tax evasion, which requires a revenue loss for conviction. In any event, there was no requirement to find them guilty beyond a reasonable doubt of causing a monetary loss in excess of $10,000 as amount of loss was not an element in their predicate offenses.[5]

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[5] The Kawashimas do not concede that the Government qualifies as a "victim" who suffered a "loss . . . in excess of $10,000" pursuant to 8 U.S.C. § 1101(a)(43)(M)(i) as a result of their plea agreements for violation of 26 U.S.C. §§ 7206(1) and (2). The Government can certainly be a "victim" like any individual or firm, for example, in the case of embezzlement against the United States. *See Balogun v. U.S. Attorney General*, 425 F.3d 1356 (11th Cir. 2005). As a matter of statutory construction, Mr. Kawashima's conviction on a tax violation under 26 U.S.C. § 7206(1) was not a removable offense. The *only* tax offense which is removable is tax evasion under 26 U.S.C. § 7601 where a *revenue* loss is required to be

In Mr. Kawashima's case, his tax violation involved intentionally making a false statement as to a material fact on his return pursuant to 26 U.S.C. § 7206(1). His conviction did not require a revenue loss. *United States v. Di Varco*, 484 F.2d 670, 672-3 (7th Cir. 1973), cert. denied 415 U.S. 916 (1974) (§ 7206(1) conviction upheld for falsely reporting the source of income even though there was no tax deficiency); *see also United States v. Helmsley*, 941 F.2d 71, 92-93 (2d Cir. 1991). An intent to evade taxes, under 26 U.S.C. § 7601, requires a specific intent to evade which is an aggravated felony, if there is a $10,000 loss as a result. There is no finding of a $10,000 loss evidenced in the record of the conviction presented. The plea agreement contained a hypothetical figure for tax loss only for sentencing purposes. *Kawashima*, 530 F.3d at 1118.

The Kawashimas merely made stipulations of fact in order to assist the court in determining offense levels and restitution. Any approach, therefore, which permits fact finding beyond the conviction or plea of guilt would be unfair to a defendant facing removal proceedings who had no reason to challenge the amount of loss in the underlying proceeding, or who agreed to an amount of loss for narrow purposes other than conviction.

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found. *See Lee v. Ashcroft*, 368 F.3d 218 (3d Cir. 2004) (Alito, J., dissenting).

CONCLUSION

For the reasons set forth herein, *amici* urge that the Court should reverse the decision of the Court below and set aside Nijhawan's order of removal and deportation.

Respectfully submitted,

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